Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

C. T. and DORIS M. JENNEMAN

Petitioners

vs.

HOWARD A. DAWSON, JR., et al.

Respondents

No. 76-348

PETITION FOR WRIT OF PROHIBITION

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION

Come now Petitioners and move the Court for leave to file the Petition for Writ of Prohibition attached hereto.

Respectfully submitted

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IN THE SUPREME COURT OF THE UNITED STATES

C. T. and DORIS M. JENNEMAN

Petitioners

vs.

HOWARD A. DAWSON, JR.
ARNOLD RAUM
BRUCE M. FORRESTER
WILLIAM M. DRENNEN
IRENE F. SCOTT
WILLIAM M. FAY
THEODORE TANNENWALD, JR.
CHARLES R. SIMPSON
C. MOXLEY FEATHERSTON
J. GREGORY BRUCE
LEO H. IRWIN
SAMUEL B. STERRETT
WILLIAM H. QUEALY
WILLIAM A. GOFFE
CYNTHIA HOLCOMB HALL
DARRELL D. WILES
RICHARD C. WILBUR
NORMAN O. TIETJENS
AUSTIN HOYT

Respondents

PETITION FOR WRIT OF PROHIBITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, C. T. and Doris M. Jenneman, respectfully pray that a writ of prohibition issue against respondents Howard A. Dawson, et al, the Judges of the United States Tax Court, to restrain them from proceeding further in the cause entitled *C. T. and Doris M. Jenneman, Petitioners,* v. *Commissioner of Internal Revenue, Respondent,* docket number 7873-4, now pending before them.

Jurisdiction of this Court to issue a writ of prohibition in this case is granted by the Act of June 25, 1948, c.646, 62 Stat. 944, as amended, 28 U.S.C. Sec. 1651.

Petitioners have exhausted their remedies, and no court other than this Court has jurisdiction at this time to grant the relief sought. Petitioners' petition for writ of prohibition was denied by the Court of Appeals for the District of Columbia Circuit on July 26, 1976, in *In re C. T. Jenneman,* No. 76-1527. A copy of its order is appended.

The question presented is whether the United States Tax Court can lawfully determine the case pending before it, i.e., whether the amendments of the statutes establishing the former Tax Court of the United States rendered it, now known as the United States Tax Court, unconstitutional. 28 U.S.C. Section 2403 may be applicable.

The constitutional provisions involved are Article III, Sections 1 and 2, of the Constitution of the United States. The statutes involved are Sections 7441, 7443(e), 7443(f), 7447(b) (1), 7456(d), and 7483 of the Internal Revenue Code of 1954, as amended by the Revenue Reform Act of 1969 (Pub. L. No. 97-172), 26 U.S.C. §§ 7441, 7443(3), 7443(f), 7747(b) (1), 7456(d), and 7483. Extracts of the foregoing are appended.

Petitioner C. T. Jenneman received a distribution from the termination of the Kroger Employees' Savings and Profit Sharing Plan with respect to which the Internal Revenue Service asserted a deficiency in petitioners' 1971 income tax. Said petitioners, acting without advice of counsel, petitioned the United States Tax Court for redetermination of the deficiency.

Section 6512(a) I.R.C. now bars petitioners from pursuing any remedy other than the suit in the Tax Court to determine their tax liability. Petitioners did not waive their constitutional right to judicial determination. *Nash Miami Motors, Inc.,* v. *Commissioner,* 358 F.d 636, (5th Cir. 1966).

While Congress need not provide judicial determination of disputed tax liability prior to payment, the opportunity for judicial review in a court established under Article III must certainly be afforded either before or after payment. The Tax Court, which is now petitioners' only recourse, cannot provide such review because its judges are not qualified by tenure to exercise the judicial power of the United States. Petitioners have no remedy at law, other than the prohibition now prayed.

The above-cited provisions of the Revenue Reform Act of 1969 purported to change the executive agency, "The Tax Court of the United States" formerly existing, into a legislative court of record, "The United States Tax Court" which is now usurping Article III jurisdiction. Court review is now provided by appeal rather than by petition for review. The Tax Court, as a putative legislative court, now renders inter-branch rather than intra-branch review of executive decisions. Its decisions are made *res judicata.* Its functions are purely judicial.

The decisions of this Court recognize the independence of the judiciary, a fundamental separation-of-powers doctrine established by history and the Constitution. *Hayburn's Case,* 2 Dallas 409 (1781); *Gordon* v. *United States,* 117 U.S. 697 (1865). The judicial power of the United States may be exercised only by "constitutional courts", those qualified under Article III. While "legislative courts" may be created as an aid to Congress to hear and determine cases which are susceptible of but do not require judicial determination, they may not exercise the judicial power of the United States, which is exclusively vested under Article III in constitutional courts. *Ex parte Bakelite Corp.,* 279 U.S. 438 (1929); *Nash Miami Motors, supra.* A "case or controversy" involving federal tax liability arises under the laws of the United States and is one to which the judicial power of the United States extends. The present Tax Court is created to hear such a case, but its judges are not afforded the assurances of independence required by Article III. It cannot act in petitioners' case.

The question is of grave importance. Blackstone, *Commentaries on the Laws of England,* Book 1, §§ 375 and 378; Declaration of Independence; *O'Donoghue* v. *United States,* 289 U.S. 516, 533 (1933).

Wherefore, your petitioners respectfully pray that a writ of prohibition be issued out of and under the seal of this Honorable Court commanding respondents to desist from any further proceedings in the said cause; and that your petitioners may have such other relief in the premises as to this Honorable Court may seem just.

Respectfully submitted,

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Of Counsel:

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APPENDIX

26 U.S.C. Section 7441 provides in part:

> There is hereby established, under Article I of the Constitution of The United States, a court of record to be known as the United States Tax Court.

26 U.S.C. Section 7443(e) provides:

> The term of office of any judge of the Tax Court shall expire 15 years after he takes office.

26 U.S.C. Section 7443(f) provides:

> Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

26 U.S.C. Section 7447(b) provides in part:

> Any judge shall retire upon attaining the age of 70.

26 U.S.C. Section 7456(d) provides:

> The Tax Court and each division thereof shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as –
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions; or
>
> (3) disobediance or resistance to its lawful writ, process, order, decree, or command.
>
> It shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.

26 U.S.C. Section 7483 provides in part:

> Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the Clerk of the Tax Court.

This contrasts with the former procedure for review of decisions of the Tax Court of the United States by "petition for review".

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1527 September Term, 1975

In Re: US Tax Court No. 7873-4

C. T. and DORIS JENNEMAN

Petitioners

Before: Wright and Wilkey, Circuit Judges

ORDER

On consideration of petitioners' petition for writ of prohibition, it is

ORDERED by the Court that petitioners' aforesaid petition is denied.

Per Curiam

Supreme Court, U. S.
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No. 76-348

In the Supreme Court of the United States

OCTOBER TERM, 1976

C. T. AND DORIS M. JENNEMAN, PETITIONERS

v.

HOWARD A. DAWSON, JR., ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AGAINST THE JUDGES OF THE UNITED STATES TAX COURT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After determining a deficiency in petitioners' income tax for 1971, the Commissioner of Internal Revenue issued a notice of deficiency to them pursuant to Section 6212 of the Internal Revenue Code of 1954. Petitioners thereupon invoked the jurisdiction of the United States Tax Court by filing a petition in that court for redetermination of the deficiency.[1]

Petitioners seek a writ of prohibition against the judges of the United States Tax Court enjoining them from

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[1]On May 7, 1976, petitioners first filed a similar motion for leave to file a petition for a writ of prohibition in this Court. However, the Court refused to docket the case because petitioners had not exhausted their lower court remedies. Petitioners did not press their constitutional claims in the Tax Court, but filed a petition for a writ of prohibition against the judges of the Tax Court in the Court of Appeals for the District of Columbia Circuit. That court denied their petition on July 26, 1976.

proceeding with their pending case. Petitioners argue that because the Tax Court is organized under Article I of the Constitution, it is not constitutionally capable of redetermining the deficiency and that if it did so, it would be "usurping" (Pet. 3) the jurisdiction reserved to Article III courts.

1. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. [A]s extraordinary remedies, they are reserved for really extraordinary cases." *Ex parte Fahey,* 332 U.S. 258, 259 260; *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 383-385. Moreover, these extraordinary writs "cannot be used as substitutes for appeals." *Id.* at 383; *Will* v. *United States,* 389 U.S. 90, 96; *Parr* v. *United States,* 351 U.S. 513, 520. There is nothing extraordinary about petitioners' claims of the unconstitutionality of the Tax Court that calls for mandamus. Since it cannot be said that the Tax Court is "clearly" without jurisdiction, this case can be considered by the Tax Court and resolved "by [an] appeal in the ordinary way." *Ex parte Davis,* 262 U.S. 274, 276.

2. There is no merit to petitioners' assertion (Motion, pp. 3-4) that the Tax Court is unconstitutionally usurping the powers of an Article III court. Pursuant to Section 951 of the Tax Reform Act of 1969, 83 Stat. 487, which amended Section 7441 of the Internal Revenue Code of 1954 (26 U.S.C.), the status of the Tax Court was changed to a "court of record" established "under article I of the Constitution of the United States."[2] As this Court stated

[2]Prior to the Tax Reform Act of 1969, the Tax Court had been an "independent agency in the Executive Branch of the Government." See Section 7441 of the Internal Revenue Code of 1954 (26 U.S.C.) before it was amended by Section 951 of the Tax Reform Act of 1969. However, Section 961 of the 1969 Act provides that the "United States Tax Court * * * is a continuation of the Tax Court of the United States as it existed * * * [under prior law] * * *, and [that] no loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending" before the Tax Court was to result from the change in that court's status.

in *Ex parte Bakelite Corp.,* 279 U.S. 438, 449, "it long has been settled that Article III [of the Constitution] does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may [also] create [other] inferior courts" of limited jurisdiction. See *Williams* v. *United States,* 289 U.S. 553, 565. The jurisdiction of these so-called "legislative courts" often extends to matters which are susceptible to judicial determination but which do not require the exercise of the judicial power of an Article III court. *Ex parte Bakelite Corp., supra,* 279 U.S. at 449, 451-452; *Williams* v. *United States, supra,* 289 U.S. at 565-566; *Burns, Stix Friedman & Co.* v. *Commissioner,* 57 T.C. 392, 398. Cf. *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 548-552. See also *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 722-728.

The United States Tax Court is such an Article I court. There is no constitutional right to a judicial hearing before payment of a tax. *Phillips* v. *Commissioner,* 283 U.S. 589, 595-597; *Nash Miami Motors, Inc.* v. *Commissioner,* 358 F. 2d 636, 638-639 (C.A. 5), certiorari denied, 385 U.S. 918. See *Willmut Gas & Oil Co.* v. *Fly,* 322 F. 2d 301, 303 (C.A. 5). In establishing the Tax Court as a special pre-payment forum for resolving certain types of federal tax cases, Congress was accordingly entitled to "attach * * * such conditions as it deem[ed] proper, even * * * requiring that * * * [such] suits be brought in a legislative court specially created [for this purpose]." See *Ex parte Bakelite Corp., supra,* 279 U.S. at 451-452. While both the United States Tax Court and its predecessors

under prior law have always exercised their special jurisdiction over tax deficiency cases in a "judicial" manner,[3] this limited jurisdiction has never involved matters " 'inherently' " or singularly committed to the "judicial power" of Article III courts. See *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 549.

It is therefore hardly surprising that, both before and after the Tax Reform Act of 1969, the courts have upheld the constitutionality of the Tax Court against the same claims made by petitioners. See, *e.g., Stix Friedman & Co.* v. *Coyle,* 467 F. 2d 474 (C.A. 8); *Nash Miami Motors, Inc.* v. *Commissioner, supra; Martin* v. *Commissioner,* 358 F. 2d 63 (C.A. 7), certiorari denied, 385 U.S. 920; *Willmut Gas & Oil Co.* v. *Fly, supra; Burns, Stix Friedman & Co.* v. *Commissioner, supra.*

It is respectfully submitted that the motion for leave to file a petition for a writ of prohibition should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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[3]See *Burns, Stix Friedman & Co.* v. *Commissioner, supra,* 57 T.C. at 400-402 (Raum, J., concurring).